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VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: *Ex Parte* Presentation; Legal Analysis of Continental Airlines, Inc.'s Wi-Fi Antenna under the Over-the-Air Reception Device Rule; ET Docket No. 05-247

Dear Ms. Dortch:

Following up on the November 10, 2005, *ex parte* meeting between The Massachusetts Port Authority ("Massport") and the staff of the Office of Engineering and Technology, this provides further detail on the statutory and constitutional infirmities of extending the Over-the-Air Reception Device ("OTARD") rule to fixed wireless signals and elaborates on the inapplicability of the OTARD rule to the Wi-Fi antenna installed by Continental Airlines, Inc. ("Continental") in the Presidents Club at Boston-Logan International Airport ("Logan").

A narrow interpretation of the OTARD criteria is absolutely essential because the FCC justified its statutory authority on the tenuous legal basis of ancillary jurisdiction. A narrow interpretation is also necessary because the FCC drew fine distinctions with respect to the scope of the OTARD rule in an attempt to navigate around various constitutional and statutory difficulties. Because the OTARD criteria reflect particular legal difficulties, any attempt to extend the OTARD protections beyond the express limits of the rule threatens to disrupt this delicate balance.

In brief, it is Massport's belief that the FCC lacks jurisdiction over the siting of antennas used to transmit or receive fixed wireless signals, especially the Wi-Fi antenna installed in Continental's Presidents Club for wireless Internet access service. Nor does the FCC have express statutory authority to compel landowners to allow their tenants to install such antennas under the Communications Act of 1934, as amended ("Communications Act"). Although the FCC relied on its ancillary jurisdiction to mandate antenna siting for fixed wireless signals, the provisions cited in support of this proposition either are inapplicable to Continental's Wi-Fi antenna or are not independent grants of delegated authority.

In addition, Massport believes the FCC lacks the statutory authority to preempt private lease agreements on the siting of antennas. Massport acted in a proprietary capacity when it entered

into the lease agreement with Continental. Because the FCC has no express or implied statutory authority to preempt antenna siting restrictions in private lease agreements, and has recognized this limitation on its authority, it may not preempt the Massport-Continental agreement.

The FCC also has no express or implied statutory authority to take a landowner's property for purposes of the OTARD rule. In particular, the FCC would engage in a per se taking by requiring landowners to permit the installation of wires on non-leased property and in a regulatory taking by interfering with the use of airport property. Although the FCC has acknowledged that it lacks the statutory authority to take property, a taking would also raise other constitutional and statutory concerns.

Even if the FCC had the statutory authority to extend the OTARD rule to antennas used to receive fixed wireless signals, Continental's Wi-Fi antenna fails to meet the criteria of an OTARD-protected antenna.

I. THE FCC LACKED THE STATUTORY AUTHORITY TO EXTEND THE OTARD RULE TO WI-FI ANTENNAS USED FOR WIRELESS INTERNET ACCESS

The FCC exceeded its statutory authority in extending the OTARD rule to antennas used to transmit or receive fixed wireless signals, especially Wi-Fi antennas used for wireless Internet access. In particular, the FCC has no express statutory authority to extend the OTARD rule to fixed wireless signals because Congress specifically limited the FCC's authority to video programming services. Although the FCC claimed to have the ancillary jurisdiction to extend the OTARD rule to fixed wireless signals, it has not identified any statutory provisions that support its jurisdiction over the siting of Wi-Fi antennas used for wireless Internet access.

A. The FCC Has No Express Statutory Authority to Regulate the Siting of Antennas Used for Fixed Wireless Signals

The FCC has no express statutory authority to extend the OTARD rule to antennas used to transmit and receive fixed wireless signals. Although Congress authorized the FCC to regulate state, local, and private restrictions on the siting of wireless antennas in the Telecommunications Act of 1996 ("1996 Act"), it specifically limited this authority to the promulgation of rules that would enable viewers to receive certain video programming services.[1] This express statutory authority was a substantive provision and not merely a timing rule or other affirmation of the FCC's existing jurisdiction over antenna siting.

In 1996, Congress authorized the FCC to regulate restrictions on over-the-air-reception devices. In particular, section 207 of the 1996 Act directed the FCC to "prohibit restrictions that impair a

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[1] Telecommunications Act of 1996, Pub. L. 104-104 § 207, 110 Stat. 56, 114 (1996) (codified as 47 U.S.C. § 303 note).

viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services."[2] The legislative history referred only to protecting a viewer's ability to use an antenna "designed for off-the-air reception of television broadcast signals or of satellite receivers designed for receipt of [direct broadcast satellite] services"[3] or "devices that permit reception of multichannel multipoint distribution services."[4] Because Congress specifically limited the FCC's rulemaking authority to reception devices used for certain video programming services, the extension of those rules to the transmission or reception of fixed wireless signals exceeded the textual boundaries of this specific statutory provision.

Despite the plain language of section 207, the FCC asserted that it possesses the substantive authority to extend the OTARD rule to fixed wireless signals under section 303(r) of the Communications Act. In the *Competitive Networks First Report and Order*, the FCC claimed that section 207 "reflects Congress' recognition that . . . the Commission has always possessed authority to promulgate rules addressing OTARDs" because that statutory provision authorizes the promulgation of regulations "pursuant to section 303."[5] The FCC stated that section 207 merely created a timing deadline for the exercise of this substantive authority under section 303(r) by requiring the promulgation of the OTARD rule "[w]ithin 180 days" after enactment.[6]

This interpretation conflicts with the plain language of section 207, the legislative history, and the structure of the Communications Act. As mentioned above, the plain language of section 207 refers only to antennas used to receive wireless video programming.[7] In the House Committee Report, the Committee noted that it "intends *this section* to preempt enforcement" of state, local, and private restrictions on the siting of video programming antennas and that such restrictions "shall be unenforceable to the extent contrary to *this section*."[8] This language indicates that the House Committee thought that section 207 itself granted the substantive

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[2] *Id.*

[3] H.R. Rep. No. 104-204, at 124 (1995), *as reprinted in* 1996 U.S.C.C.A.N. 10, 91.

[4] H.R. Rep. No. 104-458, at 166 (1995) (Conf. Rep.), *as reprinted in* 1996 U.S.C.C.A.N. 124, 179.

[5] In re Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217, *First Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 22983, 23031 ¶ 106 (2000) [hereinafter *Competitive Networks First Report and Order*].

[6] *Id.*

[7] H.R. Rep. No. 104-204, at 124 (1995), *as reprinted in* 1996 U.S.C.C.A.N. 10, 91; H.R. Rep. No. 104-458, at 166 (1995) (Conf. Rep.), *as reprinted in* 1996 U.S.C.C.A.N. 124, 179.

[8] H.R. Rep. No. 104-204, at 123-24 (1995), *as reprinted in* 1996 U.S.C.C.A.N. 10, 91 (emphasis added).

authority to preempt state, local, and private restrictions. Although section 207 also included a timing restriction, this does not diminish the substantive mandate contained in that provision.

The structure of the Communications Act further indicates that section 303(r) is not the source of the FCC's substantive authority. Section 303(r) limits the FCC's authority to promulgate regulations to those "necessary to carry out the provisions of this chapter,"[9] suggesting that this provision is not an independent grant of authority. In *Motion Picture Association v. FCC*, the D.C. Circuit recognized that the FCC must possess delegated authority under a separate statutory provision before invoking section 303(r).[10] If section 303(r) had already provided the FCC with the substantive authority to extend the OTARD rule to services other than those listed in section 207, then all of section 207, except for the three-word introductory clause regarding the timing of the rulemaking, was extraneous language. This interpretation of the statute would contradict the basic principle of statutory construction not to deny effect to any part of a statute's language.[11]

B. The FCC Has No Ancillary Jurisdiction over the Siting of Wi-Fi Antennas Used for Wireless Internet Access

The ancillary jurisdiction doctrine also fails to provide the FCC with the authority to extend the OTARD rule to antennas used for the transmission and reception of fixed wireless signals.[12] The FCC may exercise ancillary jurisdiction only if (1) its general grant of jurisdiction under Title I of the Communications Act covers the regulated subject, and (2) the regulations are reasonably ancillary to the effective performance of its statutorily mandated responsibilities.[13] Although the FCC invoked numerous statutory provisions to justify its claim of ancillary jurisdiction over antennas used for fixed wireless signals,[14] sections 1, 201(b), 202(a), 205(a), 4(i), and 303(r) of the Communications Act and section 706 of the 1996 Act are inadequate bases for its attempt to

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[9] 47 U.S.C. § 303(r) (2001).

[10] *Motion Picture Ass'n v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002).

[11] "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous . . . . No clause[,] sentence or word shall be construed as superfluous, void or insignificant if the construction can be found which will give force to and preserve all the words of the statute." Norman J. Singer, Statutes and Statutory Construction § 46:06 (6th ed. 2000) [hereinafter *Singer Statutory Construction*].

[12] Although T-Mobile accused Massport of effectively filing an untimely petition for reconsideration of the FCC's extension of the OTARD rule by ancillary jurisdiction, Reply Comments of T-Mobile USA, Inc., ET Docket No. 05-247, 27 (Oct. 13, 2005) [hereinafter *T-Mobile Reply Comments*], the FCC's enforcement of the OTARD rule in this instance would permit Massport to challenge the extension beyond the statutory time limit for reconsideration or appeal. *NLRB Union v. FLRA*, 834 F.2d 191, 195-96 (1987).

[13] *American Library Ass'n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005).

[14] *Competitive Networks First Report and Order*, 15 FCC Rcd at 23028-23035 ¶ 101-116.

regulate antenna siting, especially the siting of Wi-Fi antennas used for wireless Internet access on leased property.

Chairman Martin has also expressed his reservations regarding the extension of the OTARD rule to fixed wireless signals. In a Separate Statement to the *Competitive Networks Order on Reconsideration*, then-Commissioner Martin stated that he was "concerned with relying solely on the FCC's ancillary jurisdiction" to extend the OTARD rule to telecommunications services.[15] Although then-Commissioner Martin "appreciate[d] the policy behind extending [the FCC's] rules to telecommunications services," he noted that the statutory basis of the rule applied explicitly to wireless video programming services.[16]

1. Section 1 Provides No Authority to Regulate Antenna Siting

Section 1 of the Communications Act does not vest the FCC with general jurisdiction over the siting of antennas used for fixed wireless signals. In the *Competitive Networks First Report and Order*, the FCC attempted to justify the extension of the OTARD rule to fixed wireless signals as part of its section 1 authority to "regulat[e] interstate and foreign commerce in communications by wire and radio."[17] The FCC asserted that section 1 authorized the extension of the OTARD rule to fixed wireless antennas because the extension would "facilitat[e] efficient deployment of competitive communications services."[18]

This expansive interpretation conflicts with judicial decisions circumscribing the FCC's regulatory authority under section 1. Courts have repeatedly held that section 1 grants the FCC jurisdiction only over the actual transmission or reception of wire or radio communications.[19] For example, in *American Library Association v. FCC*, the D.C. Circuit reversed and vacated the broadcast flag rule after finding that the FCC lacked jurisdiction under Title I to require digital

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[15] In re Promotion of Competitive Networks in Local Telecommunications Markets; WT Docket No. 99-217, *Order on Reconsideration*, 19 FCC Rcd 5637, 5646 (2004) (Statement of Commissioner Kevin Martin) [hereinafter *Competitive Networks Order on Reconsideration*].

[16] *Id.*

[17] *Competitive Networks First Report and Order*, 15 FCC Rcd at 23029 ¶ 102 (quoting 47 U.S.C. § 151).

[18] *Id.*

[19] *American Library Ass'n*, 406 F.3d at 705; *Motion Picture Ass'n*, 309 F.3d at 804 (holding that the FCC had no authority under Title I to promulgate regulations that significantly implicated program *content*, as opposed to regulations that govern wire and radio *transmissions*); *Illinois Citizens Comm. for Broad. v. FCC*, 467 F.2d 1397, 1399-1400 (7th Cir. 1972) (holding that the FCC may not lawfully exercise jurisdiction over an activity that does not constitute communication by wire or radio simply because the activity "substantially affects communications").

television receivers to include technology allowing them to recognize the broadcast flag.[20] Although the FCC had claimed that the definition of "radio communication" authorized its jurisdiction over television receivers because they are the apparatus for the receipt of radio communications, the court found that this definition limits the FCC's jurisdiction "to 'apparatus' that are 'incidental to . . . transmission.'"[21] Based on this definition, the court held that "at most, the Commission only has general authority under Title I to regulate apparatus used for the receipt of radio or wire communication *while those apparatus are engaged in communication*."[22] In other words, without express statutory authorization, the FCC has the authority to regulate Wi-Fi antennas to the extent they are actively transmitting or receiving communications and lacks the authority to regulate the *siting* of those antennas.

The FCC recognized a similar distinction between the regulation of facility siting and the regulation of operational aspects of communications with respect to another service over which it exercised ancillary jurisdiction, *i.e.*, cable television.[23] In a *Report and Order*, the FCC delineated between non-federal and federal jurisdiction with respect to cable television:

> The ultimate dividing line . . . rests on the distinction between reasonable regulations regarding use of the streets and rights-of-way and the regulation of the operational aspects of cable communications. The former is clearly within the jurisdiction of the states and their political subdivisions. The latter, to the degree exercised, is within the jurisdiction of this Commission.[24]

Although the FCC had extended its jurisdiction to cover cable television, it recognized the need to refrain from exercising jurisdiction over facility siting.

The amended OTARD rule exceeds the FCC's ancillary jurisdiction because it requires landowners to permit their tenants to install antennas used for fixed wireless signals on leased property. As an initial matter, the FCC should not assert jurisdiction over entities, such as landowners, that are not engaged in "communication by wire or radio," without express authorization from Congress.[25]

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[20] *American Library Ass'n*, 406 F.3d at 691, 705, 708.

[21] *Id.* at 703.

[22] *Id.* at 704 (emphasis added).

[23] *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

[24] In re Amendment of Part 76 of the Commission's Rules and Regulations Relative to an Inquiry on the Need for Additional Rules in the Area of Duplicative and Excess Over-Regulation of Cable Television, Docket No. 20272, *Report and Order*, 54 FCC 2d 855, 861 ¶ 21 (1975).

[25] 47 U.S.C. § 152(a).

The FCC also should not assert jurisdiction over the siting of antennas used for fixed wireless signals. The act of antenna siting does not constitute "communication by wire or radio" under section 1 because it occurs prior to the transmission or reception of any radio signal. Because antennas used for fixed wireless signals are not actively transmitting or receiving "communications by wire or radio" at the time of installation, the FCC plainly exceeded the scope of its general jurisdictional grant under Title I in requiring landlords to permit the siting of such antennas on leased property. Although T-Mobile and the ATA assert that the FCC would have ancillary jurisdiction over antenna siting because the antennas are eventually used to transmit and receive communications,[26] this would only provide the FCC with authority to regulate the characteristics of the antennas themselves and not the siting of the antennas.

Finally, as mentioned above, if section 1 had granted the FCC jurisdiction to regulate the installation of antennas, Congress would not have delegated similar authority to the FCC under section 207 of the 1996 Act.

2. Title II of the Communications Act Provides No Authority to Regulate Wi-Fi Antenna Siting

The FCC also lacks general jurisdiction over the installation of Wi-Fi antennas under sections 201(b), 202(a), and 205(a) of the Communications Act.[27] As the FCC explained in the *Competitive Networks First Report and Order*, "[t]hese statutory provisions are intended to ensure that the rates, terms, and conditions for the provision of *common carrier service* are just, fair, and reasonable, and that there is no unjust or unreasonable discrimination in the provision of such service."[28] Because these provisions address the regulation of common carrier services, they provide no basis for the FCC's exercise of ancillary jurisdiction over the siting of Wi-Fi antennas for the provision of information services, such as wireless Internet access service.[29]

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[26] Reply Comments of the Air Transport Association of America, Inc., ET Docket No. 05-247, 30 (Oct. 13, 2005) [hereinafter *ATA Reply Comments*]; *T-Mobile Reply Comments* at 28. The ATA also suggests that Continental could circumvent this distinction between siting and operational aspects of the antenna "by ensuring that the antenna is in a transmitting state (e.g., beacon mode) at all times during the installation process." *ATA Reply Comments* at 30 n.94. Because Continental's Wi-Fi antenna receives Internet access from a T-1, Reply Comments of Continental Airlines, Inc., ET Docket No. 05-247, 9 (Oct. 13, 2005) [hereinafter *Continental Reply Comments*], it presumably could not transmit a signal until after the installation.

[27] 47 U.S.C. §§ 201(b), 202(a), 205(a).

[28] *Competitive Networks First Report and Order*, 15 FCC Rcd at 23030 ¶ 104 (citing 47 U.S.C. §§ 201(b), 202(a), 205(a)) (emphasis added).

[29] In re Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report to Congress*, 13 FCC Rcd 11501, 11516-17 ¶ 33 (1998) [hereinafter *Report to Congress*].

3. No Other Statutory Provision Supports the FCC's Regulation of Wi-Fi Antenna Siting

The FCC also may not base its ancillary jurisdiction on section 706 of the 1996 Act and sections 4(i) and 303(r) of the Communications Act because they are not independent sources of delegated authority.

Section 706 fails to provide the FCC with the independent statutory authority to extend the OTARD rule to the siting of antennas used to provide fixed wireless signals.[30] In section 706, Congress directed the FCC to:

> encourage the deployment on a reasonable and timely basis of advanced telecommunications capability . . . by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, and other regulating methods that remove barriers to infrastructure investment.[31]

The FCC has itself concluded that "section 706(a) does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods. Rather, *section 706(a) directs the Commission to use the authority granted in other provisions* . . . to encourage the deployment of advanced services."[32] Because the FCC has no independent authority in the Communications Act over the siting of Wi-Fi antennas, this general policy provision could not expressly authorize the FCC to override the private lease agreement between Massport and Continental.

Sections 303(r) and 4(i) are procedural provisions that fail to grant the FCC ancillary jurisdiction over the siting of Wi-Fi antennas. In *Motion Picture Association v. FCC*, the D.C. Circuit recognized that sections 303(r) and 4(i) are not themselves independent sources of delegated authority.[33] The court stated that "[t]he FCC cannot act in the 'public interest' if the agency does not otherwise have the authority to promulgate the regulations at issue. . . . The FCC must act

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[30] *Competitive Networks First Report and Order*, 15 FCC Rcd at 23030 ¶ 103 (asserting jurisdiction under section 706 over "antennas used for the transmission or reception of fixed wireless signals").

[31] 47 U.S.C. § 157 note.

[32] In re Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, *Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 13 FCC Rcd 24011, 24044-45 ¶ 69 (1998) (emphasis added) [hereinafter *Advanced Telecommunications Memorandum Opinion and Order*].

[33] *Motion Picture Ass'n v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002).

pursuant to *delegated authority* before any 'public interest' inquiry is made under § 303(r)."[34] The court similarly noted that section 4(i) "is not a stand-alone basis of authority" but "is more akin to a 'necessary and proper' clause."[35] Because section 4(i) provides no independent source of delegated authority, the FCC's "authority must be 'reasonably ancillary' to other express provisions."[36] If the FCC could rely on these provisions as sources of delegated authority, "it would be able to expand greatly its regulatory reach."[37]

Finally, T-Mobile and ATA have implied the FCC would have ancillary jurisdiction over antenna siting pursuant to sections 2, 301, 302, and 303(c)-(f) of the Communications Act.[38] Although these statutory provisions grant the FCC the authority to regulate the operation of radio frequencies, they do not provide any support for FCC jurisdiction over antenna siting. Accordingly, they fit neatly within the existing distinction between the non-federal or private regulation of facility siting and the federal regulation of operational issues. The FCC also has not asserted these provisions as a basis to extend the OTARD rule to fixed wireless signals.

4. Prior FCC Actions Provide No Basis for Ancillary Jurisdiction

The FCC may not rely on prior actions to justify the exercise of ancillary jurisdiction over the siting of antennas used to transmit or receive fixed wireless signals. In the *Competitive Networks First Report and Order*, the FCC attempted to bolster its grounds for ancillary jurisdiction by noting that it had "previously imposed similar limits on state and local regulation of the placement of antennas both before and subsequent to the 1996 Act."[39] Although the FCC referred to orders from the satellite context, those orders fail to support ancillary jurisdiction over the Wi-Fi antenna installed in Continental's Presidents Club at Logan.

The satellite orders are easily distinguishable from the Wi-Fi antenna context because the FCC based its ancillary jurisdiction over satellite antenna siting on specific statutory provisions of the Communications Act. For example, the FCC based its jurisdiction over receive-only satellite earth stations generally on section 1 and Title III and specifically on section 705.[40] Section 705

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[34] *Id.*

[35] *Id.* (citing In re Implementation of Video Description of Video Programming, MM Docket No. 99-399, Report and Order, 15 FCC Rcd 15,230 15,276 (2000) (Separate Statement of Commissioner Michael K. Powell, Concurring in Part and Dissenting in Part)).

[36] *Id.*

[37] *Id.*

[38] *ATA Reply Comments* at 29; *T-Mobile Reply Comments* at 29.

[39] *Competitive Networks First Report and Order*, 15 FCC Rcd at 23031 ¶ 106.

[40] In re Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, CC Docket No. 85-87, *Report and Order*, 59 Rad. Reg. 2d 1073, 1079-80 ¶ 23-26

"create[d] certain rights to receive unscrambled and unmarked satellite signals."[41] By contrast, as described above, the FCC relied only on general and dependent grants of jurisdiction to support its exercise of ancillary jurisdiction over Wi-Fi antennas used for wireless Internet access.

In addition, the FCC itself acknowledged that the satellite orders provide no basis for limits on *private lease restrictions*. In the *Competitive Networks First Report and Order*, the FCC noted that the satellite orders support ancillary jurisdiction "*to the extent our action today applies to state and local governments.*"[42] None of the satellite orders forced a landowner to site antennas on its property or mandated the siting of antennas in violation of a private lease restriction. The satellite orders instead addressed the siting of antennas with the acquiescence or support of the landowner. As discussed in further detail below, Massport and Continental entered into a private restricted lease agreement for the use of the Presidents Club at Logan which limited Continental's use of the property. Although Massport is an instrumentality of the Commonwealth of Massachusetts and has the power to promulgate regulations, it does *not* use its regulatory power in leasing land, but acts in its proprietary capacity. Thus, the satellite orders fail to support ancillary jurisdiction over the siting of a Wi-Fi antenna used for wireless Internet access at Logan.

II. THE FCC HAS NO AUTHORITY TO PREEMPT PRIVATE LEASE AGREEMENTS GOVERNING ANTENNA SITING

The FCC should also interpret the OTARD rule narrowly because of its limited authority to preempt private lease restrictions on antenna siting. The Supremacy Clause of the U.S. Constitution, Article VI, Clause 2, permits the federal government to preempt state laws that "'interfere with, or are contrary to federal law.'"[43] Because the preemption authority inherent in the Supremacy Clause does not apply to state instrumentalities acting in a proprietary capacity, such as Massport, the FCC needs statutory authority to preempt private lease restrictions involving such entities.

Congress has not granted the FCC the authority to preempt private lease restrictions on the siting of antennas used for fixed wireless signals. The FCC lacks the express statutory authority to

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(1986) [hereinafter *Earth Station Report and Order*]; *see* In re Preemption of Local Zoning or Other Regulation of Satellite Earth Stations, IB Docket No. 95-59, *Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 5809, 5811 ¶ 11 (1996) [hereinafter *Earth Station Report and Order and Further Notice*].

[41] *Earth Station Report and Order*, 59 Rad. Reg. 2d at 1079 ¶ 23.

[42] *Competitive Networks First Report and Order*, 15 FCC Rcd at 23031 ¶ 106 (emphasis added).

[43] *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985).

preempt private lease restrictions because section 207 of the 1996 Act applies only to antennas used to receive certain video programming services. Although the Communications Act grants the FCC limited authority to preempt state and local laws regulating facility siting, those statutory provisions do not apply to the Massport-Continental lease agreement. The FCC also lacks implied statutory authority because Congress explicitly addressed and specifically limited the FCC's preemptive authority in section 207. The FCC recognized this limit on its authority to preempt private lease agreements because it did not even attempt to justify the preemption of such agreements when it extended the OTARD rule to fixed wireless signals and has previously ruled that preemption is inappropriate for voluntary contractual agreements.

A. The FCC Lacks Preemptive Authority over a State or Local Government Acting in Its Proprietary Capacity

The FCC may not preempt private lease agreements without express or implied statutory authority. Although the Supremacy Clause permits the FCC to preempt state or local laws that conflict with federal law, "[n]ot all actions by state or local government entities, however, constitute regulation, for such an entity, like a private person, may buy and sell or own and manage property in the marketplace."[44] "When a State owns and manages property . . . the State is not subject to pre-emption by [a federal statute], because pre-emption doctrines apply only to state *regulation*."[45] "In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted," courts will not preempt such agreements.[46]

In *Boston Harbor*, the U.S. Supreme Court held that the National Labor Relations Act did not preempt the enforcement by a Massachusetts state agency, acting as the owner of a construction project, of a labor agreement negotiated by private parties.[47] The Massachusetts Water Resources Authority ("MWRA"), which is an independent state agency responsible for providing water-supply, sewage-collection, and other pollution-treatment services,[48] directed its project manager to incorporate certain terms into a labor agreement arising from a court-ordered cleanup of Boston Harbor.[49] When an interested party sought to enjoin the enforcement of these incorporated terms,[50] the Court distinguished "between government as regulator and government

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[44] *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 417 (2nd Cir. 2002).

[45] *Building and Constr. Trades Council v. Associated Builders and Contractors*, 507 U.S. 218, 227 (1993) (emphasis added) ("*Boston Harbor*").

[46] *Id.* at 231-32.

[47] *Id.* at 232.

[48] *Id.* at 220.

[49] *Id.* at 221-22.

[50] *Id.* at 223.

as proprietor" and noted that federal preemption applies only to state regulation.[51] The Court found that the contract terms dictated by the MWRA "constitute[d] proprietary conduct on the part of the Commonwealth of Massachusetts" because the MWRA sought "to ensure an efficient project . . . would be completed as quickly and effectively as possible at the lowest cost."[52] Thus, the Court ruled that the MWRA could legally enforce its "valid project labor agreement."[53]

The U.S. Court of Appeals for the Second Circuit applied this reasoning to a tower-siting lease agreement between Sprint and a school district. In *Sprint*, the court held that the 1996 Act did not preempt a local governmental entity, acting as the owner of a high school, from enforcing the provisions of a lease agreement that restricted the radio frequency emissions of a cellular communications antenna well below the limits set by the federal safety standards.[54] Sprint and a school district had entered into a lease agreement that permitted the installation of an antenna on the roof of a high school, subject to a limit on the radio emissions and other conditions.[55] The court found "nothing in the [1996 Act] to suggest that Congress meant to preempt a governmental entity's conduct that does not amount to regulation" and, to the contrary, indicated that the 1996 Act intended to preserve the distinction between regulatory and proprietary acts by state and local governmental entities.[56] The court also stated that the school district had acted in a proprietary capacity in entering into the lease agreement, noting that the school district had not adopted a general municipal ordinance or policy, had not sought to punish Sprint for past conduct, and had entered into a single lease agreement for a single building.[57] The court further reasoned that the school district had the right to impose conditions in the lease agreement because it could have refused to lease the property at all.[58] Thus, the court concluded that the 1996 Act did not preempt the private lease agreement.[59]

The Massport-Continental lease agreement is not subject to federal preemption because it is a voluntary lease agreement between private parties for the use of a certain part of Logan Airport. As with the state and local governmental entities in *Boston Harbor* and *Sprint*, Massport acted in its proprietary capacity when it negotiated and entered into the lease agreement with

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[51] *Id.* at 227.

[52] *Id.* at 232.

[53] *Id.*

[54] *Sprint*, 283 F.3d at 421.

[55] *Id.* at 408.

[56] *Id.* at 420.

[57] *Id.* at 420-21.

[58] *Id.* at 421.

[59] *Id.*

Continental.[60] Massport has not unilaterally adopted a generally applicable resolution or policy that applies to all of the properties in the city, or even to all of the properties within its ownership and management responsibility, but has entered into a lease agreement governing Continental's use of specific facilities at Logan. The lease agreement also contains no provisions designed to punish Continental for past transgressions or to implement any specific governmental requirements. Even though the lease agreement contains terms and conditions that assist Massport in satisfying its statutory obligations to manage Logan in a safe and efficient manner, this does not render the lease agreement a governmental action any more than the MWRA's court-ordered obligation to clean up Boston Harbor rendered its labor agreement for the project a governmental action.

Thus, Massport acted in its proprietary capacity when it entered into the lease agreement with Continental.[61] As discussed below, because Congress has provided the FCC with no express or

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[60] Declaration of Deborah Lau Kee in Support of The Massachusetts Port Authority, attached as Exhibit A.

[61] Although the ATA and T-Mobile assert that Massport acted in a regulatory capacity in entering into the lease agreement with Continental, Comments of the Air Transport Association of America, Inc., ET Docket No. 05-247, 9 n.15 (Sept. 28, 2005); Comments of T-Mobile USA, Inc., ET Docket No. 05-247, 10 n.13 (Sept. 28, 2005), the cases they cite for this proposition are consistent with the *Boston Harbor/Sprint* framework. In *Alamo Rent-A-Car*, the Eleventh Circuit upheld the constitutionality of two general resolutions regulating access to the airport by courtesy vehicles operated by off-airport hotels, motels, and car rental companies. *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth.*, 825 F.2d 367, 369, 373-374 (11th Cir. 1987). The court never expressly discussed the distinction between regulatory and proprietary acts by state instrumentalities, but it repeatedly noted that the airport authority's resolutions constituted *generally applicable legislation*. *Id.* at 369, 370, 371 n.4. *Alamo Rent-A-Car* serves as an example of a state instrumentality acting as a regulator by adopting overarching regulations. By contrast, Massport acted in a proprietary capacity by negotiating an individual lease agreement with Continental.

In *Capital Leasing*, the court held that an airport authority was subject to claims of concessionaires arising under the First Amendment and Equal Protection Clause of the U.S. Constitution but applied a less stringent standard of review because the airport authority had acted in a proprietary capacity to manage its internal operations. *Capital Leasing v. Columbus Mun. Airport Auth.*, 13 F. Supp. 2d 640, 655-56, 658-660 (S.D. Ohio 1998). Although the court recognized that the airport authority had acted as a private party in entering into contracts with the concessionaires, it noted that "'the government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment [or Equal Protection] constraints, as does a private business.'" *Id.* at 655, 659 (quoting United States v. Kokinda, 497 U.S. 720, 725 (1990)). *Capital Leasing* still fits within the *Boston Harbor/Sprint* framework but is unique because of the constitutional issues. By contrast, Continental has not raised any constitutional claims involving its private lease agreement with Massport.

implied statutory authority to preempt antenna siting restrictions in private lease agreements, the FCC may not preempt the Massport-Continental agreement.

B. The FCC Has No Express Authority to Preempt the Massport-Continental Lease Agreement

Congress never granted the FCC the express statutory authority to preempt private lease agreements governing the siting of Wi-Fi antennas. "Express preemption occurs to the extent that a federal statute expressly directs that state law be ousted to some degree from a certain field."[62] Although Congress granted the FCC the express authority to preempt private agreements restricting the siting of antennas used to receive certain video programming services, it limited this authority to the services listed in the statute. The FCC also lacks preemptive authority under sections 253 and 332(c)(7) of the Communications Act because those provisions apply only to state and local governments and to telecommunications services. Finally, although Congress directed the FCC to encourage the deployment of Internet access service in section 706 of the 1996 Act, the FCC has concluded that this provision is not an independent source of preemptive authority.

1. Section 207 Provides No Preemptive Authority

Section 207 of the 1996 Act limited the FCC's express authority to preempt private contracts to restrictions on the siting of antennas used to receive certain video programming services. In particular, section 207 directed the FCC to "prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services."[63] In the legislative history, the House Committee clarified that it "intends this section to preempt enforcement of . . . restrictive covenants or encumbrances that prevent the use of antennae designed for off-the-air reception of television broadcast signals or of satellite receivers designed for receipt of DBS services."[64]

Based on the explicit language in section 207 and the House Committee Report, the FCC has the authority to preempt private contracts governing the siting of antennas used to receive certain video programming services. But the House Committee specifically limited this grant of preemptive authority because it noted that "restrictive covenants or homeowners' association rules[] shall be unenforceable *to the extent contrary to this section.*"[65] Because Congress limited

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[62] *Sprint*, 283 F.3d at 415.

[63] Telecommunications Act of 1996, Pub. L. 104-104 § 207, 110 Stat. 56, 114 (1996).

[64] H.R. Rep. No. 104-204, at 123-24 (1995), *as reprinted in* 1996 U.S.C.C.A.N. 10, 91.

[65] H.R. Rep. No. 104-204, at 124 (1995), *as reprinted in* 1996 U.S.C.C.A.N. 10, 91. The House Committee further clarified that it "intends this section to preempt enforcement of . . . restrictive covenants or encumbrances that prevent the use of antennae designed for off-the-air reception of

the FCC's authority in section 207 to over-the-air reception of television broadcast, MMDS, and DBS services, and the FCC relied on its ancillary jurisdiction to extend the OTARD rule to fixed wireless signals, the express preemptive authority in section 207 does not extend to private contracts that restrict the siting of antennas used to transmit or receive fixed wireless signals.

2. Sections 253 and 332(c)(7) Provide No Preemptive Authority

The FCC has no preemptive authority under section 253 or section 332(c)(7) of the Communications Act. Although the ATA asserts that these provisions provide independent grounds for preemption,[66] it fails to recognize that those provisions apply only to state and local governmental restrictions and only to telecommunications services.

Section 253 provides the FCC with limited authority to preempt state or local laws regulating the provision of interstate or intrastate telecommunications service.[67] Although the ATA claims that this provision permits the siting of Wi-Fi antennas at Massport,[68] it ignores the plain language of the statute applying this preemptive authority solely to state and local governments and not to private parties.[69] As discussed above, Massport acted as a private party when it entered into the lease agreement with Continental.

The ATA also neglects to notice that section 253 applies only to "telecommunications services" and not to wireless Internet access,[70] which is an information service. Section 3 of the Communications Act defines "telecommunications services" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public" and "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's own choosing, without change in the form or content of the information as sent and received."[71] Although the ATA claims that "[t]here is little doubt that the wireless services in this proceeding are 'telecommunications services,'"[72] the FCC has determined that Internet access service is an information service.[73] In

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television broadcast signals or of satellite receivers designed for receipt of DBS services." H.R. Rep. No. 104-204, at 123-24 (1995), *as reprinted in* 1996 U.S.C.C.A.N. 10, 91.

[66] *ATA Reply Comments* at 23-28.

[67] 47 U.S.C. § 253.

[68] *ATA Reply Comments* at 23-27; *ATA Comments* at 18 n.42.

[69] 47 U.S.C. § 253(d).

[70] *Id.* § 253(a).

[71] *Id.* § 153(43), (46).

[72] *ATA Reply Comments* at 25.

[73] *Report to Congress*, 13 FCC Rcd at 11516-17 ¶ 33 (ruling that Internet access services are services that "alter the format of information through computer processing applications such as

the *Report to Congress*, the FCC noted that "Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their services 'via telecommunications.'"[74] Because Continental offers wireless Internet access service, it provides an information service rather than a telecommunications service. Thus, section 253 would not grant the FCC any preemptive authority over the private lease agreement between Massport and Continental.

Section 332(c)(7) preserves state and local governmental authority "over decisions regarding the placement, construction, and modification of personal wireless service facilities."[75] As discussed above, Massport did not act in its regulatory capacity when it entered into the lease agreement with Continental and, accordingly, section 332(c)(7) is not relevant.

Further, section 332(c)(7) applies only to *telecommunications services* and not to *information services*.[76] The definition of "personal wireless services" refers to "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services."[77] Although the ATA claims that the reference to "unlicensed wireless services" applies to Wi-Fi antennas used for wireless Internet access, section 332(c)(7) further defines "unlicensed wireless services" as "the offering of *telecommunications services*."[78] Because the FCC has ruled that Internet access service is an information service,[79] this statutory provision would not apply to Wi-Fi antennas.

Finally, section 332(c)(7) does not apply to antennas used for fixed wireless signals under the FCC's extension of the OTARD rules. In the *Competitive Networks First Report and Order*, the FCC concluded that customer-end devices were outside of the scope of section 332(c)(7).[80]

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protocol conversion and interaction with stored data" and that "Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their services 'via telecommunications.'"); *see* 47 U.S.C. § 231(e)(4) (excluding "telecommunications services" from the definition of "Internet access service").

[74] *Report to Congress*, 13 FCC Rcd at 11511 ¶ 21.

[75] 47 U.S.C. § 332(c)(7).

[76] *Id.*

[77] *Id.* § 332(c)(7)(C).

[78] *Id.* § 332(c)(7)(C)(iii).

[79] *Report to Congress*, 13 FCC Rcd at 11516-17 ¶ 33.

[80] *Competitive Networks First Report and Order*, 15 FCC Rcd at 23032-34 ¶ 109-115.

3. Section 706 Provides No Preemptive Authority

The FCC has no authority to preempt private lease agreements based on section 706 of the 1996 Act. As explained above, the FCC itself has concluded that section 706 does not amount to the independent source of delegated authority necessary to justify a measure as drastic as preemption.[81] Because the FCC has no independent authority in the Communications Act to preempt private contracts restricting the siting of Wi-Fi antennas used for wireless Internet access, this general policy provision could not expressly authorize the FCC to preempt the private contract between Massport and Continental.

C. The FCC Has No Implied Authority to Preempt the Massport-Continental Lease Agreement

The FCC also lacks the implied authority to preempt private lease agreements governing the siting of Wi-Fi antennas used for wireless Internet access. "Implied preemption occurs "either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, . . . or when state law is in actual conflict with federal law."[82] Courts caution that "where the federal statute contains 'a provision explicitly addressing [preemption], and when that provision provides a reliable indicium of congressional intent with respect to state authority,' preemption is restricted to the terms of that provision."[83] The FCC has stated that it employs its preemption power "only as necessary to carry out the provisions of the Communications Act."[84]

As an initial matter, Congress indicated that the FCC lacks the implied authority to preempt private lease agreements governing the siting of antennas. In section 207 of the 1996 Act, Congress explicitly addressed the preemption of private lease agreements and specifically limited the FCC's authority to certain video programming services.[85] Nothing else in the Communications Act appears to preempt private lease agreements with respect to antenna siting. Because the Communications Act contains an express preemption provision, and this provision does not grant the FCC preemptive authority over private lease agreements on the siting of antennas used for fixed wireless signals, the FCC has no implied authority to preempt the Massport-Continental lease agreement.

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[81] *See* discussion *supra* Section I.B.3.

[82] *Sprint*, 283 F.3d at 415.

[83] *Id.*

[84] In re Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antennas and Support Structures, and Amendment of Section 97.15 of the Commission's Rules Governing the Amateur Radio Service, RM-8763, *Memorandum Opinion and Order*, 17 FCC Rcd 333, 335-36 ¶ 7 (2001) [hereinafter *Amateur Radio Memorandum Opinion and Order*].

[85] *See* discussion *supra* Section II.B.1.

The FCC also may not rely on its ancillary jurisdiction for implied preemptive authority. Even assuming that the FCC has ancillary jurisdiction over OTARD antennas used to transmit or receive fixed wireless signals, an assumption which is tenuous at best, the FCC could not preempt private lease restrictions on the siting of Wi-Fi antennas used for wireless Internet access. Although the FCC could conceivably preempt state or local government regulations under the three-part test arising from *Louisiana PSC* and its progeny, this preemption doctrine does not apply to private lease agreements.[86]

D. The FCC Has Recognized that It Possesses Limited Authority to Preempt Private Lease Restrictions on Antenna Siting

The FCC recognized the constitutional and statutory limits on its authority to preempt private lease restrictions on antenna siting. Specifically, the FCC never even attempted to justify the preemption of private lease restrictions when it extended the OTARD rule to fixed wireless signals. In the *Competitive Networks First Report and Order*, the FCC noted only that "*[a]s applied to restrictions imposed by state and local governments*, our extension of the OTARD rules also falls well within the bounds of established preemption principles."[87] The entire discussion of preemption involved state or local regulations and failed wholly to address the statutory basis for preempting private lease restrictions.[88]

Even in situations where the FCC has preempted state and local laws governing antenna siting, it has refused to preempt private contractual agreements.[89] For example, the FCC declined to preempt restrictive covenants, conditions, and restrictions on the installation of antennas for Amateur Radio Service operations that are in deeds, by-laws, or leases. When the FCC initially preempted certain aspects of state and local restrictions on Amateur Radio antenna siting, it concluded that "[s]ince these restrictive covenants are contractual agreement[s] between private parties, they are not generally a matter of concern to the Commission."[90] The FCC further explained that it would not preempt private agreements because the "agreements are voluntarily entered into by the buyer or tenant."[91]

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[86] *See* discussion *supra* Section II.A.

[87] *Competitive Networks First Report and Order*, 15 FCC Rcd at 23031 ¶ 107.

[88] *Id.*

[89] *E.g.*, *Earth Station Report and Order and Further Notice*, 11 FCC Rcd at 5820 ¶ 54 (stating that the FCC has "consistently declined to consider the preemption of private covenants and deed restrictions that ban or inhibit installation of satellite antennas"); *Amateur Radio Memorandum Opinion & Order*, 17 FCC Rcd at 335-36 ¶ 7.

[90] In re Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities, PRB-1, *Memorandum Opinion and Order*, 101 FCC 2d 952, 954 ¶ 7 (1985).

[91] *Id.* at 960 ¶ 25 n.6.

In a series of orders, the FCC repeatedly affirmed this decision in response to a petition for rulemaking seeking to extend the limited preemption of state and local laws to private covenants, conditions, and restrictions.[92] The FCC acknowledged that "the Commission does not exercise its preemption authority lightly, and employs this power only as necessary to carry out the provision of the Communications Act."[93] Although the FCC noted that it had preempted private contracts in the OTARD context, it stated that the statutory goals of promoting telecommunications competition and encouraging *commercial* deployment of new telecommunications technologies were not applicable to the voluntary, *noncommercial* Amateur Radio Service.[94] The FCC further noted that it would not preempt private agreements because "there are other methods amateur radio operators can use to transmit amateur service communications that do not require an antenna installation at their residence."[95]

The FCC should similarly decline to preempt the lease agreement between Continental and Massport. Continental entered into a voluntary agreement with Massport to lease space in Terminal C at Logan. The preemption of the Massport-Continental lease agreement would not serve the statutory goals of promoting telecommunications competition and encouraging commercial deployment of new telecommunications technologies. Preemption would not further telecommunications competition because Continental uses its individual Wi-Fi antenna to provide an information service, *i.e.*, wireless Internet access, rather than a telecommunications service. Preemption would also not encourage commercial deployment of new telecommunications technology because Continental claims to offer the service on a "free," or noncommercial, basis. Continental employees also have several alternatives to receive Internet access service that do not require the installation of an antenna in the Presidents Club, such as using the central Wi-Fi antenna system or a commercial provider with an antenna located outside of Logan. Thus, the FCC should not exercise its preemption authority to invalidate the restriction on Continental's installation of a Wi-Fi antenna in the Presidents Club.

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[92] *Amateur Radio Memorandum Opinion & Order*, 17 FCC Rcd at 335-36 ¶ 7; In re Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antennas and Support Structures, and Amendment of Section 97.15 of the Commission's Rules Governing the Amateur Radio Service, RM-8763, *Order on Reconsideration*, 15 FCC Rcd 22151, 22153 ¶ 6 (2000); In re Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antennas and Support Structures, and Amendment of Section 97.15 of the Commission's Rules Governing the Amateur Radio Service, RM-8763, *Order*, 14 FCC Rcd 19413, 19415 ¶ 6 (1999).

[93] *Amateur Radio Memorandum Opinion & Order*, 17 FCC Rcd at 335-36 ¶ 7.

[94] *Id.* at 336 ¶ 7.

[95] *Id.* at 335 ¶ 6, 336 ¶ 7.

III. THE MANDATORY SITING OF WI-FI ANTENNAS WOULD VIOLATE THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT

The FCC would violate the Takings Clause of the Fifth Amendment if it were to interpret the OTARD rule to require landlords to allow the installation of individual Wi-Fi antennas at Logan. To avoid the physical taking of a landowner's property and the concomitant constitutional issues, the FCC has interpreted the OTARD statute to permit the installation of antennas that receive signals over the air only on premises within the exclusive use and control of the tenant. The FCC limited the OTARD rule to the tenant's exclusive use areas after recognizing that the installation of antennas in common and restricted access areas would constitute a physical taking. Although the FCC crafted the OTARD rule to avoid physical takings, the application of the rule in this instance would result in a regulatory taking of Massport's property.

If the FCC were to interpret the OTARD rule to allow a taking, it would also violate other statutory and constitutional provisions. In particular, the FCC concluded that it lacks the statutory authority to take property under section 207 of the 1996 Act and has not identified any other statutory provision that grants such authority. An unauthorized taking would also run afoul of the constitutional separation of powers and the Anti-Deficiency Act.

A. The FCC Would Take Property If It Mandated the Installation of Wiring in Common and Restricted Areas of Logan

The FCC would violate the Takings Clause of the Fifth Amendment if it were to interpret the OTARD rule to require Massport allow the installation of individual Wi-Fi antennas at Logan.[96] The Takings Clause prohibits the government from taking "private property . . . for public use, without just compensation."[97] Although the OTARD rule has survived a Takings Clause challenge, that case addressed only the placement of receive-only video programming antennas on property under the exclusive use or control of the tenant.[98] By contrast, the application of the OTARD rule to Wi-Fi antennas would involve the placement of wires or cables in common and restricted access areas at Logan.

The U.S. Supreme Court has held that "a permanent physical occupation authorized by government is a taking."[99] In *Loretto*, the Supreme Court struck down a New York statute

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[96] The Fifth Amendment limits the ability of the federal government to take property belonging to state or local governments without just compensation. *United States v. 50 Acres of Land*, 469 U.S. 24 (1984); *Block v. North Dakota ex rel. Board of Univ. and School Lands*, 461 U.S. 273 (1983).

[97] U.S. Const. amend. V.

[98] *Building Owners and Managers Ass'n Int'l v. FCC*, 254 F.3d 89 (D.C. Cir. 2001).

[99] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

authorizing a cable television company to place cable equipment onto private property without the owner's consent as a violation of the Takings Clause.[100] "The installation involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall."[101] Thus, the Court ruled that the statute was a per se taking.[102]

When the FCC extended the OTARD rule to tenants, it noted that "the permanent physical occupation found to constitute a per se taking in Loretto appears comparable to the physical occupation of the common and restricted access areas" of a landlord's property.[103] Based on this finding, the FCC limited the OTARD protections to the placement of antennas on property within the exclusive use or control of the tenant.

The expansion of the OTARD rule to Wi-Fi antennas would constitute a physical taking. Even if a tenant placed the Wi-Fi antenna on property under its exclusive use or control, the operation of the Wi-Fi antenna would involve "the physical occupation of the common and restricted access areas" of Logan. "To provide Internet access, every Wi-Fi antenna must have some form of access to the Internet; unless the user can establish a wireless link between the access point and off-airport facilities, the user must have a wireline connection."[104] Continental has admitted to taking Internet access service over a T-1 and to transmitting that signal over its Wi-Fi antenna.[105] T-Mobile has likewise confirmed that all of its hot spots are connected to the Internet via a T-1 cable.[106] The FCC itself has found that "[h]ot spots typically rely on high-speed landline technologies, such as T-1 lines, DSL, or cable modems, to connect to the PSTN and Internet.[107] Thus, an expansion of the OTARD rule to permit Continental, T-Mobile, and other tenants to install and use individual Wi-Fi antennas on their exclusive use property would require the placement of wires or cables in common and restricted areas of Logan and would constitute a taking under the Fifth Amendment.

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[100] *Id.* at 438-39.

[101] *Id.* at 438.

[102] *Id.* at 419.

[103] In re Implementation of Section 207 of the Telecommunications Act of 1996, CS Docket No. 96-83, *Second Report and Order*, 13 FCC Rcd 23874, 23894-95 ¶ 40 (1998) [hereinafter *OTARD Second Report and Order*].

[104] Comments of the Airports Council International-North America, ET Docket No. 05-247, 15 (Sept. 28, 2005).

[105] *Continental Reply Comments* at 9.

[106] *T-Mobile Comments* at 3, 6.

[107] In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, WT Docket No. 05-71, *Tenth Report*, 20 FCC Rcd 15908 ¶ 202 n.521 (2005).

B. The FCC Would Engage in a Regulatory Taking If It Applied the OTARD Rule to Continental's Wi-Fi Antenna

Even if the installation of wires in common and restricted access areas did not constitute a taking, the OTARD rule results in a regulatory taking of Massport's property. Courts determine whether a governmental entity has engaged in a regulatory taking by examining the following three factors: (1) the character of the governmental action; (2) its economic impact; and (3) its interference with reasonable investment-backed expectations.[108]

An examination of these factors indicates that the OTARD rule works a taking on Massport. First, the installation of a Wi-Fi antenna in Continental's Presidents Club does not substantially advance the FCC-enunciated goals of promoting "telecommunications competition" and encouraging commercial deployment of new telecommunications technologies. As discussed above, Continental uses its individual Wi-Fi antenna to provide an information service, *i.e.*, wireless Internet access, rather than a telecommunications service. In addition, the installation of this Wi-Fi antenna will not encourage commercial deployment of new telecommunications technologies because Continental offers the service on a "free," or noncommercial, basis. The installation of Continental's Wi-Fi antenna will also not bring the competition and commercial deployment to an appreciably greater segment of the population because Continental restricts wireless Internet access to frequent flier passengers who join the Presidents Club, which number only around 32 passengers per day. Thus, the U.S. government does not have a substantial interest in the installation of Continental's Wi-Fi antenna.

Second, the installation of a Wi-Fi antenna in Continental's Presidents Club would have a detrimental economic impact on Massport. As a governmental instrumentality, Massport does not operate Logan on a for-profit basis. The installation of a Wi-Fi antenna in Continental's Presidents Club would likely lead to the installation of similar antennas by other tenants and would increase the cost of Massport's management of Logan. Effective property management would require Massport to devote substantial resources to monitor the installation of antennas by tenants, evaluate the impact of those antennas on the operation of the central Wi-Fi antenna system at Logan, ensure that the antennas comply with the applicable safety codes, and undertake other associated activities. Massport would also lose revenue associated with the operation of the central Wi-Fi antenna system at Logan. These increased costs and decreased revenues would adversely impact Massport's effective management of Logan.

Third, the installation of a Wi-Fi antenna in Continental's Presidents Club would interfere with reasonable investment-backed expectations. The Commonwealth of Massachusetts established Massport to manage Logan, among other properties, with the expectation that Massport could generate sufficient revenue from tenants and the traveling public to offset the costs of operating the facility. The FCC's actions to increase Massport's operating costs and decrease its revenues would interfere with those expectations.

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[108] *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

Thus, the OTARD rule would constitute a regulatory taking based on the three-factor analysis set forth in *Penn Central*.

C. The FCC Lacks Statutory Authority to Take Property for Purposes of the OTARD Rule

The FCC should not interpret the OTARD rule to effect a per se or regulatory taking without statutory authority "in express terms or by necessary implication."[109] The U.S. Courts of Appeals have frequently reminded the FCC of its obligation to secure congressional authorization before imposing a mandatory access provision on landowners.[110] Although takings authority may be implied, "such an implication may be made only as a matter of necessity, where 'the grant [of authority] itself would be defeated unless [takings] power were implied.'"[111] The Communications Act contains no express or implied statutory authority for either a per se or a regulatory taking.[112]

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[109] *Western Union Tel. Co. v. Pennsylvania R.R.*, 195 U.S. 540, 569 (1904).

[110] *E.g.*, *FCC v. Florida Power & Light*, 480 U.S. 245, 251-53 (1987) (upholding the pole attachments provision of the Communications Act on the ground that "nothing in the Pole Attachments Act as interpreted by the FCC in these cases gives cable companies any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into attachment agreements with cable operators"); *GTE Serv. Corp. v. FCC*, 205 F.3d 416, 419, 421, 423, 426 (D.C. Cir. 2000) (holding that the FCC's interpretations of the physical collocation requirement in section 251(c)(6) were impermissibly broad and could result in takings of local exchange carrier property); *Gulf Power Co. v. FCC*, 187 F.3d 1324, 1328-29 (11th Cir. 1999) (holding that the mandatory access provision of the Pole Attachments Act effects a taking because utilities have "no choice but to permit a cable company or telecommunications carrier to permanently occupy physical space on its poles, ducts, conduits, and rights-of-way"); *Bell Atl. Tel. Co. v. FCC*, 24 F.3d 1441, 1446 (D.C. Cir. 1994) (upholding a challenge to the FCC's physical collocation rule because nothing in the Communications Act explicitly authorized the FCC to order takings of LECs' property through physical collocation).

[111] *Bell Atlantic*, 24 F.3d at 1446.

[112] The interpretation of the OTARD rule to allow a taking would also raise additional constitutional and statutory concerns. An unauthorized taking would raise separation of powers issues under the U.S. Constitution because the right of eminent domain belongs to Congress and not to individual administrative agencies. Any FCC action to take property without statutory authority would constitute an unauthorized taking and usurp Congress's exclusive powers of lawmaking, raising revenue, and appropriating money from the Treasury. U.S. Const. art. I, § 8, cl. 1, art. I, § 9, cl. 7; *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1510 (D.C. Cir. 1984) (*en banc*), *vacated on other grounds*, 471 U.S. 1113 (1985). Where the FCC's interpretation of a statute would effect a taking, "use of a narrowing construction prevents executive encroachment

1. The OTARD Statute and Orders Provide No Support for a Taking

Section 207 of the 1996 Act grants no express or implied authority to mandate the taking of a landowner's property for the siting of an OTARD antenna. This statutory provision applies to the reception of video programming services "through devices designed for over-the-air reception."[113] In addition, the statute specifies only television broadcast, multichannel multipoint distribution service, and direct broadcast satellite service.[114] The legislative history also refers exclusively to "over-the-air" and "off-the-air" reception of signals.[115] This focus on specific wireless signals precludes any interpretation of the statute to include any other wireless service or permit a per se taking through the installation of a wire to receive service. Section 207 simply contains no express language authorizing the FCC to engage in any taking, even a regulatory taking.

The FCC concurred that section 207 grants no express or implied authority for the per se taking of a landowner's property.[116] As an initial matter, the title of the OTARD rule indicates that it governs the siting of antennas used for over-the-air reception devices,[117] as opposed to devices that receive signals over a T-1. When extending the OTARD rule to tenants in the *OTARD*

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on Congress's exclusive powers." *Bell Atlantic*, 24 F.3d at 1445. Thus, the FCC should interpret the Communications Act and OTARD rule to avoid effecting a taking of Massport's property.

The FCC should also refrain from altering its interpretation of the OTARD rule because Congress is sensitive to the need for express takings authority. For example, Congress enacted mandatory access provisions after the U.S. Supreme Court held that the Pole Attachment Act did not authorize takings of utility poles, *compare Florida Power & Light*, 480 U.S. 245 (1987) *with* 47 U.S.C. § 224(f), and again after the D.C. Circuit held that the FCC lacked authority to mandate physical collocation. *Compare Bell Atlantic*, 24 F.3d 1441 (D.C. Cir. 1994) *with* 47 U.S.C. § 251(c)(6).

An unauthorized taking of property would also violate the Anti-Deficiency Act, 31 U.S.C. § 1341 (2003), because Congress has not appropriated funds to compensate property owners, such as Massport. The purpose of the Anti-Deficiency Act is to keep governmental disbursements and obligations for expenditures within the limits of the amounts appropriated by Congress. These obligations include compensation due for Fifth Amendment takings. An interpretation of the OTARD rule to allow a taking would expose the U.S. government to the kind of open-ended liability that the Comptroller General and courts have found to violate the Anti-Deficiency Act.

[113] 47 U.S.C. § 303 note.

[114] *Id.*

[115] H.R. Rep. No. 104-204, at 124 (1995), *as reprinted in* 1996 U.S.C.C.A.N. 10, 91.

[116] *OTARD Second Report and Order*, 13 FCC Rcd at 23882 ¶ 17, 23894 ¶ 38, 23897 ¶ 44.

[117] 47 C.F.R. § 1.4000 (2004).

Second Report and Order, the FCC carefully distinguished between premises within the tenant's exclusive use or control and common and restricted access areas.[118] "Interpreting Section 207 to grant viewers a right of access to possess common or restricted access property for the installation of the viewer's Section 207 device would impose on the landlord . . . a duty to relinquish possession of property."[119] The FCC found that the siting of antennas in common and restricted access areas would appear to constitute a per se taking.[120] The FCC recognized that section 207 "does not expressly authorize [it] . . . to permit a taking," that this provision does not imply a takings authority,[121] and that "there is no compensation mechanism authorized by the statute."[122] Thus, the FCC concluded that mandating access to common and restricted access areas of the landowner's property would exceed the scope of its statutory authority.[123]

The FCC also concluded that section 207 grants no express or implied authority for the regulatory taking of a landowner's property. In the *OTARD Second Report and Order*, the FCC stated that "[s]ection 207 does not expressly authorize the Commission to permit the taking of private property" and that it is not "necessary to authorize a taking of private property in order to comply with Congress' direction."[124] Although the FCC found that the OTARD rule would not result in a regulatory taking of a landlord's property,[125] the three-part *Penn Central* analysis requires a fact-specific examination that is not possible in a general rulemaking proceeding.

2. *BOMA* Provides No Support for a Taking

The U.S. Court of Appeals for the D.C. Circuit has not approved all applications of the OTARD rule as not effecting a taking. Although the D.C. Circuit upheld a facial challenge to the OTARD rule on takings grounds, it has not addressed the placement of wiring in common or restricted access areas or a fact-specific regulatory takings claim.

In *Building Owners and Managers Association International v. FCC*, the court upheld the extension of the OTARD rule to tenants against a facial challenge that the amended rule was a per se taking.[126] The court found that the amended OTARD rule was not a "compelled physical

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[118] *OTARD Second Report and Order*, 13 FCC Rcd at 23882 ¶ 17, 23894-97 ¶ 38-44.

[119] *Id.* at 23893 ¶ 35.

[120] *Id.* at 23894-95 ¶ 40, 23897 ¶ 44.

[121] *Id.* at 23894 ¶ 38.

[122] *Id.* at 23897 ¶ 44.

[123] *Id.* at 23894 ¶ 38, 23897 ¶ 44.

[124] *Id.* at 23882 ¶ 17.

[125] *Id.* at 23886-87 ¶ 24-26.

[126] *Building Owners and Managers Ass'n v. FCC*, 254 F.3d 89, 99 (D.C. Cir. 2001).

invasion" because the landowner had granted the tenant the right to occupy the property.[127] Although the court reasoned that the lease of the property enabled the FCC to regulate a term of the occupation,[128] the court did not address the occupation of property outside of the leasehold, such as the common and restricted access areas.[129] The court also noted that the petitioners could not satisfy the fact-specific requirements for a regulatory taking claim in a facial challenge to the OTARD rule but invited them to "make claims for just compensation on account of regulatory takings with respect to their individual buildings."[130] Thus, the court never foreclosed per se takings claims based on the installation of wires in common or restricted areas or regulatory takings claims based on specific factual scenarios.

3. The Competitive Networks Orders and the Public Notice Provide No Support for a Taking

Nothing in the FCC's subsequent orders identifies newfound statutory authority for a per se or regulatory taking. Although the FCC relied on ancillary jurisdiction to extend the OTARD rule to antennas used to transmit or receive fixed wireless signals,[131] this hodgepodge of statutory provisions is insufficient to authorize a taking. The FCC should not infringe upon Massport's constitutionally protected rights without a specific legal basis.

An interpretation of the OTARD rule to effect a taking would also be inconsistent with the FCC's statements in the *Competitive Networks First Report and Order*. When the FCC extended the OTARD rule to antennas used to transmit or receive fixed wireless signals, it found that "there is no constitutional impediment to our forbidding restrictions on the placement of antennas on property within the tenant user's exclusive use."[132] The FCC based this conclusion on its reasoning from the *OTARD Second Report and Order* and never once suggested that the extension of the OTARD rule would permit the installation of wires on the common or restricted areas of the landowner's property.[133] The FCC even noted that it had not "confer[red] a right as against a building owner in restricted or common use areas."[134] Although the FCC decided to

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[127] *Id.* at 97-99.

[128] *Id.* at 98.

[129] The court specifically noted that the FCC "did not . . . extend the OTARD rule to the placement of antennas on common property such as outside walls (where viewers may have access but not possession and exclusive rights of use or control) or restricted access areas such as rooftops (where viewers generally do not have access or possession)." *Id.* at 93.

[130] *Id.* at 100.

[131] *Competitive Networks First Report and Order*, 15 FCC Rcd at 23028- 23031 ¶ 101-106.

[132] *Id.* at 23034 ¶ 116.

[133] *Id.* at 23034-35 ¶ 116.

[134] *Id.* at 23038 ¶ 124.

apply the OTARD rule to transmitting antennas, which are undeniably more disruptive to landlord operations, the FCC never revisited its regulatory taking analysis.

The *Competitive Networks Order on Reconsideration* and *Public Notice* also contain no evidence of statutory authority for a taking. In the *Competitive Networks Order on Reconsideration*, the FCC affirmed its statutory authority to extend the OTARD rule to antennas used to transmit or receive fixed wireless signals but never addressed the takings issue.[135] The *Public Notice* likewise contained no discussion of the takings issue, merely a recital of the FCC's authority over radio frequency interference and a clarification that the OTARD rule applies to unlicensed devices.[136] Although the *Public Notice* mentioned Wi-Fi access points, which are typically connected to a T-1, the FCC could not reasonably have intended to reverse years of precedent by suddenly mandating wired access to common and restricted areas through a Public Notice issued at the Bureau level.

Although ATA and T-Mobile asked the FCC to interpret the "outdated" OTARD rule to achieve the policy goal of fostering the installation of Wi-Fi antennas,[137] this new interpretation would still constitute a taking. In *Loretto*, the Supreme Court held that a taking occurs "regardless of the public interests served in a particular case."[138] Thus, policy goals must yield to constitutional and statutory limitations.

IV. CONTINENTAL HAS NOT INSTALLED AN OTARD-PROTECTED ANTENNA

The Wi-Fi antenna in Continental's Presidents Club fails to meet the criteria of an OTARD-protected antenna as set forth in the OTARD rule and associated orders, even assuming that the FCC had the statutory authority to extend the rule to fixed wireless signals.

A narrow interpretation of the OTARD criteria is absolutely essential because the FCC justified its statutory authority on the tenuous legal basis of ancillary jurisdiction. A narrow interpretation is also necessary because the FCC drew fine distinctions with respect to the scope of the OTARD rule in an attempt to navigate around various constitutional and statutory difficulties. Because the OTARD criteria reflect particular legal difficulties, any attempt to extend the OTARD protections beyond the express limits of the rule threatens to disrupt this delicate balance.

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[135] *Competitive Networks Order on Reconsideration*, 19 FCC Rcd at 5640-41 ¶ 8, 5643 ¶ 15.

[136] Commission Staff Clarifies FCC's Role Regarding Radio Interference and Its Rules Governing Customer Antennas and Other Unlicensed Equipment, *Public Notice*, 19 FCC Rcd 11300, 11300-02 (2004).

[137] *T-Mobile Reply Comments* at 17, 29-31; *T-Mobile Comments* at 14-15; *ATA Reply Comments* at 32-33; *ATA Comments* at 18-20.

[138] *Loretto*, 458 U.S. at 426; *GTE Service Corp.*, 205 F.3d 416 (holding that the FCC could not rely on policy goals to overcome statutory terms of the 1996 Act).

The OTARD rule does not apply to Continental's Wi-Fi antenna because the antenna (1) is not primarily a customer-end antenna; (2) does not transmit a commercial non-broadcast signal; (3) receives service through a wire instead of wirelessly; and (4) is not on property within the exclusive use and control of the antenna user.

A. Continental Has Not Installed a Customer-End Antenna

Continental has no right to install and use its Wi-Fi antenna because the OTARD protections apply only to customer-end antennas. In the *Competitive Networks First Report and Order*, the FCC limited the extension of the OTARD rule to customer-end antennas to avoid a conflict with the 1996 Act's express preservation of state and local zoning authority over antenna siting pursuant to section 332(c)(7).[139] The FCC sidestepped this potential conflict by concluding that the OTARD rule would apply to customer-end antennas but not to personal wireless service facilities, such as hub sites and relays.[140] If the FCC had not interpreted the amended OTARD rule as covering only customer-end antennas, it could not have claimed preemptive authority over state and local governmental antenna siting restrictions.

The FCC subsequently clarified that the OTARD rule would apply to certain hubs and relays that also provide service to the customer.[141] In particular, the FCC noted that "to invoke the protections of the OTARD rule, the equipment *must be installed in order to serve the customer on such premises* . . . ."[142] The FCC further stated that "the OTARD protections would apply to installations serving the premises customer that also relay signals to other customers . . . but would not apply to installations that are designed *primarily* for use as hubs for distribution of service . . . ."[143] The OTARD rule will not apply to carriers that "simply locate their hub-sites on the premises of a customer in order to avoid compliance with a legitimate zoning regulation."[144]

The record in this docket indicates that the Wi-Fi antenna was not installed to serve the premises customer, *i.e.*, Continental, but was instead installed as a hub to serve Continental's Presidents Club members. In the *Petition*, and in a letter to Massport dated June 23, 2005, Continental stated that it provides wireless Internet access "to its customers at the President's Club."[145] In the *Supplemental Petition*, Continental amended its assertion to include employees but still indicated

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139 *Competitive Networks First Report and Order*, 15 FCC Rcd at 23032-34 ¶ 109-115.

140 *Id.* at 23028 ¶ 99.

141 *Competitive Networks Order on Reconsideration*, 19 FCC Rcd at 5643 ¶ 16.

142 *Id.* at 5644 ¶ 17 (emphasis in original).

143 *Id.* at 5644 ¶ 17 n.42 (emphasis added).

144 *Id.* at 5644 ¶ 17.

145 Petition of Continental Airlines, Inc. for a Declaratory Ruling, ET Docket No. 05-247, 3, Exhibit B (July 8, 2005) [hereinafter *Petition*].

that "the wireless service in our Presidents Club is *primarily* a service offered free of charge to our frequent flyer customers who are members of the Club."[146]

Although Continental belatedly attempted to fit within the OTARD rule by claiming that its own employees use the wireless Internet access service in the Presidents Club, it has not provided sufficient evidence to support this assertion. As mentioned above, "the OTARD protections apply to installations serving the premises customer that also relay signals to other customers" but not "to installations that are designed *primarily* for use as hubs for distribution of service."[147] In the *Supplemental Petition*, Continental concedes that "the wireless service in our Presidents Club is *primarily* a service" for Presidents Club members.[148] This admission suggests that Continental's Wi-Fi antenna is actually a hub for the distribution of service and does not qualify for the OTARD protections.

Continental claims that the wireless Internet access service "is also routinely used by our employees who are members of the Presidents Club or otherwise [are] allowed access."[149] Although Continental implied that its employees receive wireless Internet access service without having to join the Presidents Club,[150] a Continental flight attendant filed comments in this docket reporting that he has to pay a "membership fee" to use this service.[151] Continental subsequently admitted that:

> [m]ost of our officers at the Vice President level or higher are able to access the [Presidents] Club without having to pay a membership fee. Other employees, like our customers, can either purchase a membership or use a valid boarding pass and show their Platinum American Express Card to gain access to the Club.[152]

Based on these admissions, Continental has demonstrated, at most, a token use of the Wi-Fi antenna by employees who are not Presidents Club members. Continental still has not provided records identifying any use of the wireless Internet access service by employees and, in fact, concedes that it has no record of any employee use.[153] Although Continental had estimated that

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[146] Supplement to Petition of Continental Airlines, Inc. for a Declaratory Ruling, ET Docket No. 05-247, 2 (July 27, 2005) (emphasis added) [hereinafter *Supplemental Petition*].

[147] *Competitive Networks Order on Reconsideration*, 19 FCC Rcd at 5644 ¶ 17 n.42 (emphasis added).

[148] *Supplemental Petition* at 2 (emphasis added).

[149] *Id.* at 3.

[150] *Id.*

[151] Comments of Robert A. Waldrip, ET Docket No. 05-247 (Aug. 17, 2005).

[152] *Continental Reply Comments* at Exhibit A ¶ 2.

[153] *Id.* at 7 n.7.

nearly half of the thirty-two daily users of the Wi-Fi antenna at Logan are Continental employees,[154] it now appears that Continental derived this figure from the observations of its General Manager at Logan who only visits the Presidents Club an average of once per day.[155] Because of the entry restrictions on employees, and the number and travel itineraries of upper echelon corporate officers, the FCC could reasonably assume that virtually all employees who use the Wi-Fi service are paying Presidents Club members.

Continental appears to have bolstered the number of alleged employee users through questionable counting mechanisms. As mentioned above, Continental has no accurate indicator of the number of users of the Wi-Fi antenna. Continental also appears to count as employees certain paying Presidents Club members and corporate officers who use the Wi-Fi system while traveling for pleasure.[156] These employees should not count toward the total number of internal Continental users because they do not use the Wi-Fi system in their capacity as employees.

Thus, Continental's Wi-Fi antenna is not primarily a customer-end antenna and may not receive the OTARD protections. Although the OTARD rule applies to hub sites that primarily serve the premises customer, Continental has admittedly installed a hub site primarily to serve Presidents Club members. Continental alleged employee use in an attempt to qualify for the protections of the OTARD rule but has suggested, at most, only token employee use by a subset of corporate officers.

B. Continental Does Not Transmit or Receive Commercial Non-Broadcast Communications Signals over the Wi-Fi Antenna

Continental should not receive the protections of the OTARD rule because its Wi-Fi antenna fails to transmit or receive "fixed wireless signals." Section 1.4000(a)(2) of the FCC's rules defines the term "fixed wireless signals" to mean "any commercial non-broadcast communications signals transmitted via wireless technology to and/or from a fixed customer location."[157] Because Continental has boasted that it offers Wi-Fi service for "free," and indicates that no part of the Presidents Club fee is used to cover the Wi-Fi service,[158] it cannot now claim that it provides "commercial" service.

The FCC adopted the definition of "fixed wireless signals" in the *Competitive Networks First Report and Order*.[159] Although the FCC never expressly discussed the source of the term

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154 *Supplemental Petition* at 3; *Petition* at Affidavit.

155 *Continental Reply Comments* at Exhibit A ¶ 2.

156 *Id.*

157 47 C.F.R. § 1.4000(a)(2).

158 *Continental Reply Comments* at 8.

159 *Competitive Networks First Report and Order*, 15 FCC Rcd at 23027 ¶ 97.

"commercial," it presumably intended to use the everyday meaning, which is "of, in, or relating to commerce" or "having profit as the primary aim."[160]

This definition coincides with the FCC's statutory justification for extending the OTARD rule to antennas used to transmit or receive fixed wireless signals. As described in greater detail above, the FCC based the extension of the OTARD rule on the commercial aspect of fixed wireless service. For example, the FCC based its ancillary jurisdiction over the siting of antennas for fixed wireless signals under sections 201(b), 202(a), and 205(a) of the Communications Act.[161] These Title II requirements apply only to telecommunications carriers, which provide a commercial service for profit. The FCC also relied on section 706 which encourages the use of "measures that promote competition in the local telecommunications market."[162]

The FCC also relied on the commercial aspects of the fixed wireless signals to preempt state and local restrictions on antenna siting. In particular, the FCC claimed the authority to preempt state and local laws on the siting of antennas by noting that "[f]ixed wireless technologies provide an alternative to the incumbent LEC's offering of basic and advanced services."[163]

In addition, the FCC used several words and phrases throughout the *Competitive Networks First Report and Order* and *Competitive Networks Order on Reconsideration* that indicate its focus on "commercial" as a "for profit" enterprise. For example, the FCC repeatedly used terms such as "customer," "subscriber," "customer-end antenna," and "competition" when discussing the OTARD rule. Chairman Martin also referred to the extension of the OTARD rule to fixed wireless signals as applying to "telecommunications services."[164]

Finally, the FCC refused to extend the preemption of private contracts to the siting of Amateur Radio Service antennas after finding that OTARD's statutory goals of promoting telecommunications competition and encouraging commercial deployment of new telecommunications technologies do not apply to a noncommercial service.[165]

The OTARD rule would not permit the installation and use of the Wi-Fi antenna in the Presidents Club because Continental does not use the antenna to receive or transmit commercial fixed wireless signals. Specifically, Continental has admitted that it receives Internet access service over a T-1 and uses the Wi-Fi antenna to relay a signal to its Presidents Club members

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[160] Webster's Third New International Dictionary 456 (1986).

[161] *Competitive Networks First Report and Order*, 15 FCC Rcd at 23030 ¶ 104.

[162] *Id.* at 23030 ¶ 103.

[163] *Id.* at 23034 ¶ 114.

[164] *Competitive Networks Order on Reconsideration*, 19 FCC Rcd at 5646 (Statement of Commissioner Kevin J. Martin).

[165] *Amateur Radio Memorandum Opinion and Order*, 17 FCC Rcd at 336 ¶ 7.

and select employees at no charge.[166] Thus, because the FCC has limited the OTARD protections to fixed wireless service customers who receive a *commercial* wireless signal, and has not applied the OTARD protections to individuals who receive a *non-commercial, or "free,"* wireless signal, Continental has no right to install a Wi-Fi antenna in the Presidents Club.

C. The Wi-Fi Antenna Does Not Receive Wireless Signals Originating or Terminating Outside of Continental's Exclusive-Use Premises

The OTARD rule also should not apply because Continental does not use its Wi-Fi antenna to communicate with a fixed wireless service provider outside of the Presidents Club. Section 1.4000 of the FCC's rules provides no protection for antennas installed and used only for transmission or reception of signals originating within a lessee's exclusive-use premises. Because Continental has not intended for its Wi-Fi antenna to receive or transmit fixed wireless signals to a commercial service provider outside of the Presidents Club, the OTARD rule would not authorize the installation and use of that antenna.

Section 207 of the 1996 Act requires that the OTARD antenna communicate with commercial wireless signals located outside of the premises. As discussed above, this statutory provision directed the FCC to "prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services."[167] The wireless signals mentioned in the statutory language clearly originated outside of the antenna user's premises because they were sent by television broadcasters or other FCC licensees.

When the FCC extended the OTARD rule to leased property in the *OTARD Second Report and Order*, the wireless requirement became even more important because of the takings implications of wired service. The FCC repeatedly indicated that the intent of the OTARD rule is to permit lessees to install and use antennas that are necessary to receive and transmit wireless signals originating or terminating outside of the exclusive-use premises. In the *OTARD Second Report and Order*, the FCC concluded that the OTARD rule will permit renters to "install Section 207 reception devices wherever they rent space outside of a building, such as balconies, balcony railings, patios, yards, gardens, or any other similar areas."[168] The FCC further explained that the OTARD rule will allow "the installation of Section 207 devices inside rental units and anticipates the development of future technologies that will create devices capable of receiving

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166 *Continental Reply Comments* at 8.

167 Telecommunications Act of 1996, Pub. L. 104-104 § 207, 110 Stat. 56, 114 (1996).

168 *OTARD Second Report and Order*, 13 FCC Rcd at 23875 ¶ 2.

video programming signals inside buildings."[169] The FCC noted that "[o]ne such device, LMDS, is already capable of receiving signals inside buildings."[170]

This language demonstrates that the intent of the OTARD rule is to permit the premises customer to receive wireless signals from outside the premises through the installation of an antenna outside the premises, if the tenant has rights to outside facilities, or inside the premises, if the tenant does not lease any space outside of the building. In other words, a wireless access point used only for an in-premises LAN is not a "Section 207 device" because it is not needed by the tenant to receive or transmit communications signals of a commercial provider originating or terminating outside the premises.

Even when the FCC extended the OTARD rule to fixed wireless signals, it based its decision on the need for a customer to receive services from outside of its exclusive-use premises. In the *Competitive Networks First Report and Order*, the FCC stated that "*the protection of Section 1.4000 applies only to antennas at the customer end of a wireless transmission.*"[171] The FCC incorporated the concept of a wireless transmission from an off-premises commercial provider into its definition of "fixed wireless signals," which it described as "any *commercial* non-broadcast communications signals transmitted *via wireless technology to and/or from a fixed customer location.*"[172]

The FCC also declined to grant customers the right to operate wireless devices generally on leased premises. To the contrary, the FCC refused to extend the OTARD rule to the operation of "hub or relay antennas used to transmit signals to and/or receive signals from multiple customer locations."[173] Although the FCC subsequently permitted the use of point-to-point-to-point and mesh architectures, it limited the OTARD rule to "any customer-end device that would have been covered by our rules were it not for the devices' routing/relaying functionality."[174] Thus, the FCC restricted the applicability of the OTARD rule to customer-end antennas that receive or transmit signals to or from a commercial provider located outside of the lessee's exclusive-use premises.

Continental has not installed its Wi-Fi antenna to transmit or receive fixed wireless signals to or from a commercial provider located outside of the Presidents Club. As mentioned above, Continental receives Internet access service over a T-1, uses the Wi-Fi antenna to create a

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169 *Id.* at 23875-76 ¶ 2.

170 *Id.* at 23876 ¶ 2.

171 *Competitive Networks First Report and Order*, 15 FCC Rcd at 23028 ¶ 99 (emphasis added).

172 47 C.F.R. § 1.4000(a)(2) (emphasis added).

173 *Competitive Networks First Report and Order*, 15 FCC Rcd at 23028 ¶ 99.

174 *Competitive Networks Order on Reconsideration*, 19 FCC Rcd at 5644 ¶ 18.

wireless LAN within the Presidents Club, and does not transmit signals to a commercial provider located outside of the Presidents Club. Thus, because Continental does not use the Wi-Fi antenna to communicate wirelessly with a commercial provider located outside of the Presidents Club, the OTARD rule would not authorize the installation and use of its antenna.

D. Presidents Club Members Have No Direct or Indirect Ownership or Leasehold Interest in the Clubroom

Section 1.4000(a)(1) specifically limits the OTARD protections to restrictions "on property within the exclusive use and control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property."[175] The FCC presumably adopted this requirement because of the Takings Clause, which precludes mandatory third-party access to landowners' property without statutory authorization.

Continental's Presidents Club members are the primary, if not exclusive, users of the Wi-Fi antenna in the clubroom. As discussed above, Continental installed the Wi-Fi antenna primarily for the use of these Presidents Club members and have, at most, unsubstantiated token employee use. Although Continental's Presidents Club members are the only users that qualify as "antenna users" under section 1.4000(a)(1), they may not assert OTARD rights because they fail to satisfy either component of this criterion.

Presidents Club members have no "direct or indirect ownership or leasehold interest" in the clubroom. As an initial matter, Presidents Club members lack direct leasehold interests because they have not entered into individual lease agreements with Massport. Presidents Club members also lack indirect leasehold interests. Although the FCC has extended OTARD rights to the father of a homeowner who resided on the property and had a power of attorney to act on behalf of his son,[176] it has never permitted mere *customers* or *visitors* of a tenant to exercise such rights. Continental has also not conferred its leasehold interest on its Presidents Club members. Section 16.1 of the Lease Agreement states that "[t]enant shall not . . . sublet the Premises or any part thereof or allow the same to be used or occupied by others . . . without, in each instance, obtaining the prior written approval of the Authority."[177] Because Continental has not followed the requisite procedures for obtaining Massport's prior written approval for a sublet of the Presidents Club,[178] the Presidents Club members have not obtained an indirect leasehold interest

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[175] 47 C.F.R. § 1.4000(a)(1).

[176] In re Roberts, CSR 5531-0, *Memorandum Opinion and Order*, 16 FCC Rcd 10972, 10977 ¶ 11 (2001).

[177] *Lease Agreement* § 16.1, attached as Exhibit A to Comments of The Massachusetts Port Authority, ET Docket No. 05-247 (Sept. 28, 2005).

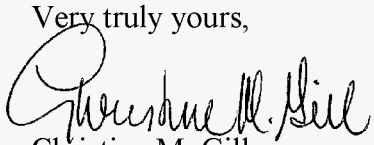
[178] Section 16.2 establishes conditions of subletting property at Logan, including the assumption of all obligations under the Lease Agreement and the payment of additional rent. *Id.* § 16.2.

in the clubroom. Even if the Presidents Club members had an indirect leasehold interest in the clubroom by virtue of paying their membership dues, they would still be subject to the provisions of the Lease Agreement prohibiting the installation of Wi-Fi antennas without prior approval.[179]

The OTARD protections also should not apply to Continental's Presidents Club members because they lack "exclusive use and control" of the clubroom. Although Continental has the right to exclude non-members from the Presidents Club, no individual member has the exclusive right to permit or deny access to the clubroom.

Thus, because members of the Presidents Club have no rights under the OTARD rule, Continental also has no right to install a Wi-Fi antenna under the OTARD rule.

Very truly yours,



Christine M. Gill

cc: Bruce Franca
Lauren Van Wazer
Bruce Romano
Jamison Prime
Gary Thayer
Fred Campbell
Sam Feder

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[179] *Id.*